

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning High-Speed)	GEN Docket No. 00-185
Access to the Internet Over)	
Cable and Other Facilities)	

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

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January 10, 2001

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The National Cable Television Association (“NCTA”) hereby submits its reply comments in the above-captioned docket.

INTRODUCTION AND SUMMARY

The initial comments confirm the wisdom of the Commission’s adherence to a policy of “vigilant restraint.” Commenters from diverse segments of the communications industry agree – and the Commission itself has consistently found – that broadband facilities and services are being deployed rapidly by cable operators, telephone companies, and others. In response to market forces, cable operators have committed to providing their subscribers with a choice of unaffiliated ISPs. They have commenced trials to test technical solutions for accomplishing this goal.

Nothing in the initial comments undermines NCTA’s conclusion that cable modem service is a cable service or an information service, but not a telecommunications service, and that under any regulatory classification, forced access requirements are unlawful. Arguments to the contrary ignore the Commission’s prior rulings and the mutually exclusive nature of

“information services” and “telecommunications services.” The implications of proponents’ misguided legal arguments are staggering: if cable companies offering cable modem service are found to be providing a telecommunications service, then any ISP that uses its own facilities to provide subscribers with access to the Internet is at risk of being regulated as a common carrier.

More importantly, however, the initial comments do not provide any basis for the Commission to impose forced access requirements even if it had discretion to do so. The speculative complaints that cable operators might act anticompetitively in the absence of forced access are overwhelmed by the evidence that market forces prevent such behavior. Arguments for “regulatory parity” may likewise be dismissed as thinly veiled attempts by cable’s competitors to hinder the broadband deployment by the cable industry. If these arguments were accepted, no good, and much mischief, would result. Demands for parity are more appropriately addressed by Congress, not this Commission.

Because the market is working, government-mandated access to the cable platform is unnecessary. Government regulation is also fundamentally inconsistent with the complex business and technical issues that must be addressed in negotiations between cable operators and ISPs. Finally, the imposition of an unwarranted and burdensome regulatory regime would stifle the development of the unique, innovative relationships and service offerings that have begun to emerge in this nascent marketplace both on the Internet and through interactive services. The scope and range of access obligations proposed by commenters proves indisputably that regulatory intervention will inevitably result in extensive government regulation of the Internet with no foreseeable end.

In the absence of any legal or policy justification for forced access – and the substantial case against it – the Commission should reject calls to impose such a scheme. Rather, it should

use this proceeding to clarify the legal underpinnings of its market-based approach, which has thus far served consumers well.

I. THE COMMENTS CONFIRM THAT CABLE MODEM SERVICE IS A CABLE SERVICE OR AN INFORMATION SERVICE, BUT NOT A TELECOMMUNICATIONS SERVICE

The initial comments confirm NCTA’s argument that cable modem service is a cable service, which is a type of information service subject to regulation under Title VI of the Communications Act. Even if cable modem service is not a cable service, it clearly remains an information service. Commenters who contend that cable modem service is a telecommunications service misstate the nature of the service that cable operators are providing.

The fact that cable modem service is a cable service, however, does not mean that local franchising authorities (“LFAs”) may impose forced access requirements on cable operators within their jurisdiction. Such requirements are prohibited by numerous provisions of the Communications Act, preempted by the Act’s general structure, which carefully limits the scope of LFA authority, and in any event, violate the First Amendment.

A. Cable Modem Service Falls Within The Statutory Definition Of A Cable Service.

Many commenters agree with NCTA that cable modem service is a cable service. Those commenters that argue to the contrary assert one of three arguments: first, that cable modem service is not “available to all subscribers generally” as required by the statutory definition;^{1/} second, that cable modem service has two-way capabilities that remove it from the statutory definition of a “cable service”;^{2/} and third, that cable modem service cannot be a cable service

^{1/} See, e.g., Association of Communications Enterprises at 6-7; Competitive Access Coalition at 18-19; Earthlink at 10-11; OpenNet at 14-15; SBC/BellSouth at 42-44; Verizon at 14.

^{2/} See, e.g., Alliance for Public Technology at 4-6; Association of Communications Enterprises at 7-8; Competitive Access Coalition at 19-22; CompTel at 36; Earthlink at 5-6, 13-14; Utilicom Networks at 13; Verizon at 14-15; WorldCom at 10.

because certain of its features, such as e-mail, clearly are not cable services. None of these arguments has merit.

1. Cable operators make cable modem service available to all subscribers.

Cable modem service is “made available generally to all subscribers” within the meaning of the Cable Act.^{3/} In considering whether a cable service is available to all subscribers, the crucial inquiry is not, as some claim,^{4/} whether each subscriber chooses to take advantage of the availability of the service. Under such a definition, more expensive tiers of cable service – such as expanded sports channels or HBO – would not be cable services, since not all subscribers receive them; yet there is no question that those services are cable services.

Further, the argument by Earthlink and others^{5/} that Internet content is not “made available” by the cable operator because the cable operator “has no involvement in the creation or selection of that material” is preposterous. While cable operators perform an important editorial function in designing and assembling programming packages, they do not “create” the vast majority of the content that comprises their video offerings; rather it is created by program producers and sold to cable operators as a package. Internet content is no different. Congress specifically rejected the notion that in order for a cable operator to “make available” the information in a cable service to its subscribers, it must create the information.^{6/}

^{3/} See 47 U.S.C. §522(14) (defining “other programming service”).

^{4/} See, e.g., Association of Communications Enterprises at 6-7; Competitive Access Coalition at 18-19; OpenNet at 14-15; SBC/BellSouth at 42-44; Verizon at 14.

^{5/} See Earthlink at 10-11; Verizon at 13-14.

^{6/} See H.R. Rep. No. 98-934 at 42 (1984) (“1984 House Report”) (“the Committee does not intend to restrict the manner in which cable operators may obtain the information provided as a cable service. In particular, it is not the intent of the Committee to require the cable operator actually to create such information.”).

2. The interactive capabilities of cable modem service do not remove it from the definition of a cable service.

There also can be no argument that the reference to “one-way transmission to subscribers” in the statutory definition of “cable service”^{7/} precludes cable services from including any interactive capabilities.^{8/} As NCTA explained in its initial comments,^{9/} the inclusion of the phrase “subscriber interaction” in the original definition of cable services in the 1984 Cable Act demonstrates that Congress has always recognized that cable services could include some upstream transmissions from subscribers. The legislative history of the 1984 Act explains that the phrase “one-way transmission” was meant only to exclude telephony-type services from the definition of a “cable service,” and was not meant to preclude interactive capabilities.^{10/}

Congress further clarified that “cable service” may include interactive components when it amended the definition of “cable service” as part of the 1996 Act to add the words “or use.” The definition now reads “subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service.”^{11/} The legislative history of the 1996 amendment explains that this change reflects the evolution of cable services from the traditional one-way provision of video programming to include interactive services.^{12/} An

^{7/} 47 U.S.C. § 522(6).

^{8/} See, e.g., Alliance for Public Technology at 4-6; Association of Communications Enterprises 7-8; Competitive Access Coalition at 19-22; CompTel at 36; Utilicom at 13; WorldCom at 10.

^{9/} NCTA at 6-8.

^{10/} See 1984 House Report at 42 (voice communications is not a cable service). The 1984 House Report makes clear that non-voice services that involve an interactive component, including those in which the subscriber makes a request for information – such as the ability to download computer software or video games – are cable services. See *id.*

^{11/} 47 U.S.C. §522(6) (emphasis added).

^{12/} See H.R. Rep. 104-458 at 169 (1996) (“1996 Conference Report”).

interpretation of “cable services” that excluded interactivity would render this language inoperative, and thus cannot be correct.^{13/}

There is similarly no support in the statutory language or legislative history for the arguments of some commenters that while cable services may offer two-way interactivity, cable modem service includes *too much* individualized interactivity to qualify.^{14/} OpenNet, for example, attempts to distinguish between two-way communications and “[t]wo-way individualized content,”^{15/} but there is no support for this distinction. It is irrelevant that not all subscribers who receive Internet service receive the same information at the same time. Indeed, such an argument does not hold up even as applied to a cable operator’s traditional video programming offerings. Subscribers who select certain pay-per-view movies also “individualize” the video content of the information sent and received, but there is no question that pay-per-view offerings are part of cable operators’ cable service.

3. A cable service may include features that do not themselves fall within the definition of cable service.

Several commenters allege that because cable operators’ cable modem service may offer e-mail, chat rooms, or other features that may not themselves be cable services, cable modem service itself is not cable service, and cable operators offering it can therefore be subject to forced access requirements.^{16/} This argument fails on several grounds.

As an initial matter, e-mail and chat rooms offered over a cable system are arguably cable services. As the conferees on the 1996 Telecommunications Act explained, the addition of the

^{13/} Statutes must be interpreted to give effect to all language of the statute. *See* NCTA at 7 & n.11.

^{14/} *See, e.g.*, Competitive Access Coalition at 21-22; CompTel at 36; Earthlink at 13-14; OpenNet at 14-17; Verizon at 14-15.

^{15/} OpenNet at 15.

^{16/} *See, e.g.*, Earthlink at 13-14; OpenNet at 14; Qwest at 4-5; Verizon at 13-15.

words “or use” to the definition of cable service was intended “to reflect the evolution of cable service to include . . . *information services* made available to subscribers by the cable operator....”^{17/} The Commission already has concluded that Internet access, including e-mail and chat rooms, is an information service.^{18/} When Internet access, with its attendant functionalities, is provided by a cable operator, it is a cable service under the amended definition.

Even if e-mail or chat rooms provided as part of a cable modem service were somehow outside the definition of cable service, that fact would not affect the classification of the core offering of cable modem service itself. Arguments to the contrary ignore both the statutory language and legislative history. The statute requires only that the service offer a “video programming” or “other programming service” within the meaning of the definition of cable services, not that the service be exclusively restricted to those attributes. Further, the legislative history of the 1984 Cable Act makes clear that including non-cable services as part of a cable service package does not “contaminate” the cable service or transform it into a non-cable service.^{19/}

While the legislative history does suggest that non-cable service features offered by a cable operator would not be regulated under Title VI,^{20/} the features cited by the commenters, such as e-mail, chat rooms, shop-at-home, and bank-at-home services, are information services if

^{17/} 1996 Conference Report at 169.

^{18/} See *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11536 ¶ 73 (1998) (“*Universal Service Report*”); see also NCTA at 8-13.

^{19/} See 1984 House Report at 44; see also *See Universal Service Report*, 13 FCC Rcd 11501, 11536, 11539 ¶¶ 75, 79 (“it would be incorrect to conclude that Internet access providers offer subscribers separate services -- electronic mail, Web browsing, and others -- that should be deemed to have separate legal status, so that, for example, we might deem electronic mail to be a ‘telecommunications service,’ and Web hosting to be an ‘information service’”).

^{20/} See 1984 House Report at 44.

they are not cable services.^{21/} Even if their inclusion with cable modem service somehow meant that none of the features of cable modem service fell within the definition of cable service, the end result would be classification of cable modem service as an information service. As NCTA and other commenters have shown, an information service offered by a cable operator cannot be subject to forced access requirements.^{22/}

4. Local franchising authorities agree that cable modem service is a cable service, but that does not entitle them to impose forced access requirements on cable operators.

Most local government commenters agree that cable modem service is a cable service, but then go on to argue that this classification entitles them to impose forced access requirements on cable operators at their discretion.^{23/} This argument is fatally flawed. As NCTA and many others discussed extensively in their initial comments, forced access requirements are prohibited by the Communications Act.^{24/} Nothing in local government's "inherent police powers," their

^{21/} See *U.S. v. Western Electric Co., Inc.*, 673 F. Supp. 525, 589-90 (discussed the "widely available information services" such as electronic banking services, brokerage account services, customer services by a variety of businesses, and home shopping services). The Telecommunications Act of 1996 generally adopted the Modification of Final Judgment's definition of information service. See H.R. Rep. 104-204, Part 1, at 125 (1995) ("Information service" . . . [is] defined based on the definition used in the Modification of Final Judgment"); *Universal Service Report*, 13 FCC Rcd at 11520 ¶ 39.

^{22/} See NCTA at 22-32; AT&T at 20-32; Comcast at 11-26; Cox at 30-41.

^{23/} See NATOA at 19-27; Marin Telecommunication Agency at 3, 8-9; Town of East Hampton and Town of Southampton, New York at 7-9. Marin goes even further and asserts cities could use their authority over public rights-of-way to require cable operators to obtain a second franchise and pay a franchise fee to provide cable modem service if it is classified as telecommunications service. Marin at 7-8. The imposition of such requirements would run afoul of Section 253 (c), however, if the operator's provision of such service does place any additional burdens on the public right of way. See *Petition of the State of Minnesota for a Declaratory Ruling*, Memorandum Opinion and Order, 14 FCC Rcd 21697, ¶60 n.129 (1999) (listing the limited scope of local rights-of-way regulation permitted under Section 253 (c)). Where a cable operator does not construct separate facilities to offer additional services, Congress intended the cable franchise fee to provide full compensation to the city for use of the rights-of-way. See NCTA Comments in WT Docket No. 99-217, CC Docket No. 96-98 ("Competitive Networks"), filed October 12, 1999, at 12. Even where the operator does construct separate facilities, a separate franchising requirement must be narrowly focused on rights-of-way management. Cities may not impose "a redundant 'third tier' of telecommunications regulation," *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief*, Memorandum Opinion and Order, 12 FCC Rcd 21396 at ¶105 (1997), and any compensation required for the use of the rights-of-way must be "fair and reasonable" and "nondiscriminatory." 47 U.S.C. §253(c).

^{24/} See NCTA at 18-26; AT&T at 7-25; Cablevision at 14-16; Comcast at 11-18; Cox at 26-41.

need “to address anticompetitive conduct in individual communities,”^{25/} or their ability to impose customer service standards under Section 632 supersedes these prohibitions, or entitles local franchise authorities to exercise *any* authority over cable modem service, except as otherwise specifically provided in the Act.

The enactment of the Cable Act in 1984 limited LFA authority over cable operators to those powers specifically identified in the Act in order to create a national, uniform scheme of regulation.^{26/} Thus, any “inherent police power” that LFAs may have had prior to that were made subject to the federal regulatory scheme. Since 1984, the scope of permissible local cable regulation has been based on the Communications Act. Title VI of the Act specifically prohibits the imposition of forced access and preempts inconsistent local regulation.^{27/}

a) The Communications Act and general principles of preemption preclude LFAs from imposing forced access requirements.

The Communications Act, as amended by the 1984 Cable Act, establishes a federal framework for local cable regulation. Since 1984, the Act has applied “with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in Title VI.”^{28/} The 1984 Act was intended to establish a “national policy [and] clarify the . . . system of local, state and

^{25/} NATOA at 26; *see also id.* at 24-27; Marin Telecommunication Agency at 8-9; Town of East Hampton and Town of Southampton, New York at 7-9.

^{26/} 47 U.S.C. §§ 521(1)-(3); *see also* 1984 House Report at 19.

^{27/} In *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999), the court held that a local government could require the operator of an open video system (“OVS”) to obtain a franchise, notwithstanding the statutory exemption from the federal franchise requirement in Title VI. *See* 47 U.S.C. § 573(c)(1)(C). Apart from that limited holding, however, *City of Dallas* does not authorize local governments to ignore or supersede the regulatory framework established in Title VI. Section 636 explicitly preempts any local requirement that is “inconsistent” with Title VI or any other provision of the Communications Act.

^{28/} 47 U.S.C. § 152(a).

Federal regulation of cable television.”^{29/} Congress specifically recognized the widespread problems inherent in unfettered and open-ended local oversight of the cable franchising process.^{30/} To remedy the situation, Congress intended that “the provision[] of . . . franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform Federal standards that are not continually altered by [any] regulation.”^{31/} The 1984 Act “defin[ed] and limit[ed] the authority that a franchising authority may exercise through the franchise process,”^{32/} and created a “system of local, state and Federal regulation of cable television”^{33/} designed to harmonize the regulatory obligations imposed on cable providers.

Section 636(c) ensures this harmony by expressly preempting any state or local law or regulation that is inconsistent with the Communications Act.^{34/} The preemptive intent of this section is echoed in the 1984 Act’s legislative history, which explains that states may regulate only in certain franchise-related areas and only if the regulation is consistent with Title VI.^{35/} The preemption embodied in Section 636 is reinforced by Section 624(a) of the Act, which explicitly provides that a franchise authority “may *not* regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [the Cable Act].”^{36/}

^{29/} 1984 House Report at 19.

^{30/} *See id.* at 21-22, 23-24.

^{31/} *Id.* at 24 .

^{32/} *Id.* at 19 (emphasis added).

^{33/} 1984 House Report at 19. *See* 47 U.S.C. § 521(1) (one purpose of Title VI is to “establish a *national* policy concerning cable communications”) (emphasis added); *id.* § 521(2) (Title VI is intended to “establish franchise procedures and standards”); *id.* § 521(3) (Title VI is intended to “establish guidelines for the exercise of . . . local authority with respect to the regulation of cable systems”).

^{34/} 47 U.S.C. § 556(c).

^{35/} 1984 House Report at 94.

^{36/} 47 U.S.C. § 544(a) (emphasis added). The limitations of Section 621(a)(4)(c) also reinforce the limited LFA role in evaluating cable operators. In awarding a cable franchise, an LFA is permitted to examine only whether the

There can be no mistaking Congress' intent: the 1984 Act preempts state and local regulatory regimes that conflict with its provisions or interfere with the accomplishment of its objectives. Any other conclusion would result in the "crazy quilt" of inconsistent regulation that Congress meant to avoid. Particularly as applied to the global medium of the Internet, such a result would frustrate the federal goal of a national policy for cable.^{37/} Indeed, as Chairman Kennard has observed, "There are 30,000 local franchising authorities in the United States. If each and every one of them decided on their own technical standards for two-way communications on the cable infrastructure, there would be chaos. . . . The market would [then] be rocked with uncertainty: investment would be stymied. Consumers would be hurt."^{38/}

As demonstrated by NCTA and others in their comments,^{39/} a forced access requirement imposed on cable operators providing cable modem service would violate Section 621(c) of the Act by treating cable systems as common carriers or utilities "by reason of providing [a] cable service."^{40/} As a requirement that is blatantly "inconsistent" with the Communications Act, locally imposed forced access is preempted by Section 636.

cable operator "has the financial, technical, or legal qualifications to provide cable service." 47 U.S.C. § 541(a)(4)(C).

^{37/} See *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 714 (E.D. Va. 2000) (local forced access ordinance is preempted by several provisions of Title VI, which was enacted to "establish a national policy concerning cable communications," and by "the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation") (quoting 47 U.S.C. § 521(1); 47 U.S.C. § 230(b)(2)).

^{38/} Remarks of William E. Kennard, Chairman, Federal Communications Commission, before the National Cable Television Association, Chicago, Illinois, June 15, 1999.

^{39/} See NCTA at 18-21; AT&T at 25-26; Comcast at 28-29.

^{40/} 47 U.S.C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.").

b) Section 632 does not permit local franchise authorities to impose forced access requirements.

Contrary to the arguments of several local government commenters, Section 632 does not permit local franchise authorities to impose forced access requirements. Under Section 632, local franchising authorities may establish and enforce consumer protection and customer service requirements for cable operators.^{41/} Forced access requirements exceed LFA authority in both instances.

The legislative history of section 632 explains that “customer service means the direct business relation between a cable operator and a subscriber.”^{42/} Examples of permissible requirements include cable system office hours and telephone availability, the location of consumer service offices, interruptions of service, disconnections, service calls, and communications between the cable operator and the subscriber, including standards governing bills and refunds.^{43/} Broad, intrusive requirements that dictate the terms and conditions under which cable operators offer their subscribers a choice of ISPs are clearly not the type of customer service requirement contemplated by Congress.

Nor does local franchise authorities’ power under section 632 to enact or enforce consumer protection laws allow them to impose forced access requirements. Although section 632 permits cities to apply statutes addressing such matters as negative billing option practices, fraud, and misleading advertising to cable operators,^{44/} such laws are permissible only to the

^{41/} 47 U.S.C. § 552.

^{42/} 1984 House Report at 79.

^{43/} *See id.*

^{44/} *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd 1226, 1265 ¶ 111 (1994).

extent they are not specifically preempted by the Communications Act. As discussed above, the Communications Act specifically preempts forced access requirements.

c) Section 613(d) does not allow local franchise authorities to impose forced access requirements.

The Town of East Hampton is wrong in arguing that Section 613(d)(2), which under certain circumstances enables a local franchising authority to bar the acquisition of a cable system, is an authorization to impose forced access requirements.^{45/} As a threshold matter, Section 613(d)(2) empowers LFAs only in connection with the transfer of ownership or control of a cable system. It is not a general grant of authority.

Even in the context of system transfers, Section 613(d)(2) does not authorize the imposition of a forced access requirement. Section 613(d)(2) allows an LFA to prohibit the acquisition of a cable system if it determines that the acquisition “may eliminate or reduce competition in the delivery of a cable service.” This language was added in 1992 specifically to overturn a court decision reversing a local franchising authority denial of a cable franchise transfer on the basis that the transferee cable operator planned to combine two competing cable systems into one.^{46/} The 1992 amendment must therefore be understood to allow franchising authorities to deny a franchise to a person only if the grant would limit “competitive cable service in a franchise area”^{47/} where, for instance, an incumbent cable operator is acquiring a cable overbuilder. Importantly, the 1992 amendment left undisturbed the underlying assumption that local cable franchising authority powers are expressly delineated by the contours of the Act, and do not arise from any pre-existing or otherwise reserved general regulatory powers.

^{45/} Town of East Hampton and Town of Southampton, New York at 8.

^{46/} See *Cable Alabama Corp. v. City of Huntsville*, 768 F. Supp. 1484 (N.D. Ala. 1991).

^{47/} H.R. Rep. No. 102-628, at 91 (1992).

In any event, the deployment of cable modem services by cable companies does not “eliminate or reduce competition in the delivery of a cable service.” To the contrary, such deployment provides consumers with additional Internet service and telephony options without reducing the existing choice of providers.

B. Cable Modem Service Is Clearly An Information Service.

Many commenters agree with NCTA that regardless of whether cable modem service is the specialized type of information service that is a “cable service,” it is clearly an information service.^{48/} OpenNet, however, argues, without citing any support, that “a provider of an information service does not maintain a wire or other connection directly to the consumer’s home,” and that cable operators, who operate and maintain transport facilities, cannot be information service providers. Instead, OpenNet contends, cable operators provide their subscribers with a telecommunications service that connects them to information service providers.^{49/}

There is no statutory or other foundation for the distinction OpenNet suggests. As OpenNet itself acknowledges, the definition of information service contemplates the “offering” of capabilities for “making available” information “via telecommunications.” OpenNet’s unsupported assertion is also directly contrary to the FCC’s finding that some ISPs self-provide their own network facilities^{50/} without losing their identity as ISPs or somehow becoming telecommunications carriers.

^{48/} See NCTA at 8-13; see also AT&T at 20-27; Comcast at 11-15; CompTel at 37-40; Cox at 26-29; SBC/BellSouth at 14; WorldCom at 11-12.

^{49/} OpenNet at 16-17. Verizon and BellSouth have elsewhere acknowledged that an information service provider does not provide telecommunications, regardless of whether it “uses its own telecommunications facilities or facilities purchased from a carrier.” *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Comments of BellSouth Corporation (filed Nov. 29, 2000) at 7; *Bell Atlantic Tel. Co. et al. v. FCC et al.*, No. 99-1479 (D.C. Cir.), Brief for Petitioners (filed Sept. 1, 2000) at 13 n.8.

^{50/} See *Universal Service Report*, 13 FCC Rcd at 11508, 11528 ¶¶ 15, 55, 69.

C. Cable Modem Service Does Not Fall Within The Statutory Definition Of A Telecommunications Service.

The comments also support NCTA's argument that cable modem service is not a telecommunications service. "Telecommunications service" is defined by the Act as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."^{51/} "Telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."^{52/} Some commenters assert that cable modem service fits this definition because (1) the user is choosing the content of the information sent and received, while the cable operator provides only a "pipeline";^{53/} (2) cable modem service is provided for a fee to the public; and (3) "when a cable modem system provides transmission facilities for Internet access," cable operators are "providing a 'telecommunications service' between the end user and the ISP."^{54/} These assertions are either erroneous or irrelevant.^{55/} Cable modem service is in no respect a telecommunications service. Further, as NCTA explained in its initial comments,^{56/} because cable modem service is not a telecommunications service, cable operators are not required to make universal service contributions by reason of providing it.^{57/}

^{51/} 47 U.S.C. § 153(46).

^{52/} *Id.* § 153(43).

^{53/} *See, e.g.,* Association of Communications Enterprises ("ACE") at 3-4, 8-9 (quoting *Portland*); Competitive Access Coalition at 9, 12-13 OpenNet at 12-14; Qwest at 4-6; WorldCom at 11.

^{54/} WorldCom at 11.

^{55/} Many of these commenters cite the *Portland* decision for the proposition that cable modem service is a telecommunications service. However, the Ninth Circuit's discussion on this point was *dicta*; it did not distinguish between "telecommunications" and "telecommunications service"; and in any event specifically deferred to the FCC on this point. *See* NCTA at 10 n.23.

^{56/} NCTA at 12 n.30.

^{57/} *Cf.* CenturyTel at 2, 10; OPASTCO at 3-4; Texas Office of Public Utility Counsel at 20-21; USTA at 23-24; Utilicom at 14. If the Commission wished to extend universal service obligations to ISPs that "self-provide"

1. Cable operators provide significantly more than a “pipeline” to the Internet.

The cable modem service offered by cable operators is not a mere “pipeline” to the Internet. Cable operators do substantially more than “facilitate[] Internet access.”^{58/} As demonstrated in the comments submitted by cable operators in this proceeding, cable modem service generally includes a substantial amount of unique content added by the cable operator. Cablevision, for example, makes non-commercial educational content focused on local and community interests available through its Optimum Online service.^{59/} Indeed, the FCC’s Office of Plans and Policy has recognized Cablevision’s emphasis on “significant operator-provided content.”^{60/} Cablevision also offers “Power to Learn,” an educational initiative tailored to teachers, students, and parents in the New York metropolitan area.^{61/} Comcast similarly provides distinctive local content as part of its cable modem service, Comcast@Home,^{62/} as does AT&T’s AT&T@Home service.^{63/} Cable operators also create “home pages” and enter into commercial relationships in which certain selected web sites or portals are featured on these home pages, so that subscribers can access those Internet sites through those homepage “links.”^{64/} Contrary to Verizon’s assertions,^{65/} the fact that cable operators allow subscribers to bypass this content if

facilities on a non-common carrier basis pursuant to Section 254(d), 47 U.S.C. § 254(d), such a determination would have to be applied to all such ISPs and not just cable operators.

^{58/} *Cf.* WorldCom at iii.

^{59/} Cablevision at 3, 10-11.

^{60/} *Id.*

^{61/} *Id.* at 11.

^{62/} *See* Comcast at A-4 n.8.

^{63/} *See* AT&T at 11.

^{64/} *See* AT&T at 15.

^{65/} Verizon at 11.

they choose and proceed directly to the Internet content of their choice does not alter the fact that cable operators provide more than pure transmission.

Even without the addition of content, the Commission has found that establishing Internet connectivity and offering Internet access service involves significantly more than providing a pipeline. Thus, it has concluded that Internet access service is an information service rather than a telecommunications service.^{66/} Contrary to the assertions of some commenters,^{67/} classifying cable modem service as an information service does not contradict the Commission's determination that DSL service is a telecommunications service. Cable operators do not sell pure transport to the public for a fee. DSL, by contrast, is just such an offering, which is why it is subject to regulation under Title II.

ILEC commenters draw a false parallel between cable modem service and their own common carrier DSL service, but the relevant comparison is between Comcast@Home, for instance, and verizon.net. Tellingly, neither of these services is subject to common carrier regulation. In order to apply common carrier principles to cable operators, ILECs and some ISPs would force cable operators to deconstruct their cable modem service and offer its component parts separately. If cable modem service has a separately cognizable "telecommunications service" component, as these commenters suggest, then any ISP that employs its own facilities to provide subscribers with access to the Internet is at risk of being regulated as a common carrier.

^{66/} See *Universal Service* Report, 13 FCC Rcd at 11536 ¶ 74 (finding that Internet access service "go[es] beyond the provision of a transparent transmission path"); NCTA at 8-9 & nn.16-17.

^{67/} See, e.g., WorldCom at 11, citing *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012 (1998); Qwest at 6, citing *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand*, 15 FCC Rcd 385 (1999) ("Remand Order"). In the *Remand Order*, the Commission held that DSL service was either telephone exchange or telephone access service. As described above, however, DSL, unlike cable modem service, is pure transport offered to the public for a fee. Because cable modem service is significantly more than a "pipeline" to the Internet, it is readily distinguishable from DSL.

There is no basis in law or policy for conscripting cable companies into the ranks of common carriers.^{68/}

2. That cable modem service is available for a fee to the public does not make it a telecommunications service.

The fact that cable modem service is available for a fee to all interested members of the public does not make it a telecommunications service. The offering of a service to the public for a fee is a necessary but not sufficient condition of regulation as a common carrier. Not all services available for a fee are telecommunications services. Indeed, many information services are generally available for sale without anyone arguing that they are consequently common carriers. Cable operators likewise sell their video offerings to the public for a fee, but not even the ILECs have argued that cable companies are telecommunications carriers as a result. While cable operators offering cable modem service are offering a service via telecommunications, that does not make cable modem service itself a telecommunications service.^{69/}

3. Cable operators do not provide a telecommunications service even between an ISP and an end user.

Even where a cable operator offers subscribers a choice of unaffiliated ISPs, the operator will not be providing a telecommunications service to the ISP or the end user. As to ISPs, operators will likely enter into arrangements similar to the affiliation agreements under which

^{68/} See NCTA Comments at 18-32, 57-62. Where it serves their own purposes -- for instance, limiting the scope of Section 271 -- the ILECs argue that there is no severable telecommunications service component of an information service. See *Bell Atlantic Tel. Co. et al. v. FCC et al.*, No. 99-1479 (D.C. Cir.), Brief for Petitioners (filed Sept. 1, 2000) at 17 (“a service that supplies the ability to gather, transform, and process information ‘via telecommunications’ cannot itself be ‘telecommunications’”); see generally *id.* at 11-22; see also *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Comments of BellSouth Corporation (filed Nov. 29, 2000) at 6 (regardless of whether the facilities are owned or leased, “to the extent the provider of an information service is using telecommunications, it cannot also be deemed to be providing telecommunications”); *id.*, Comments of Qwest Communications International Inc. at 3-4 (“the provision of an information service cannot constitute the provision of telecommunications . . . an information service provider *uses* telecommunications but does not itself *provide* telecommunications”).

^{69/} See NCTA at 9-13.

they carry video programming services today. Cable operators that choose instead to provide pure transport capability to ISPs can do so on an individually-negotiated, private carriage basis rather than as common carriers.^{70/}

Nor will an operator be selling pure transport to subscribers who choose to purchase their Internet access from one of the unaffiliated ISP available over the cable system. Rather, the operator will provide the capabilities necessary for subscribers to choose from among the ISPs it makes available. In AT&T's Boulder trial, for example, AT&T provides subscribers with a "Service Agent" tool that will allow them to select ISPs (including multiple ISPs for a single household) from their desktops, choose their connection speed (and change speeds based on the needs of the particular application being used), and navigate through the new ISP choice environment.^{71/} The Service Agent also will have diagnostic functions and help customers identify where additional support is available. Ultimately, it will sort out billing information.^{72/} None of the foregoing services and capabilities would qualify as the separate offering of transport capability for a fee that comprises telecommunications service.

^{70/} See *id.* at 14-16; Comcast at 24-25; Cox at 44-46. Because cable modem service is not a telecommunications service, the Commission need not consider whether it is appropriate to forbear from applying Title II regulation to cable modem service. See, e.g., *NOI* at ¶ 50; Competitive Access Coalition at 45-69; Earthlink at 57; Progress and Freedom Foundation at 14-16; Texas Office of Public Utility Counsel at 10-12, 14-16; Verizon at 21-40. If the Commission were to find that cable modem service is a telecommunications service, however, forbearance from all such regulation would be appropriate under the tests set out in Section 10 of the Act, 47 U.S.C. §160(a)(1)-(3). Cable's lack of market power in video and Internet access services make enforcement of Title II against cable operators providing cable modem service unnecessary. See Section II, *infra*. The Commission has long refrained from imposing traditional Title II regulation on non-dominant carriers, who, by definition, lack market power and therefore the ability to engage in the anticompetitive conduct that is the target of such regulation. See NCTA at 30-32. Finally, forbearance would "be consistent with the public interest," *id.* §160(a)(3), by continuing the policy of vigilant restraint that encouraged the substantial investments in broadband services documented by the Commission in the *706 Reports*.

^{71/} See AT&T at 63.

^{72/} *Id.*

D. There Is No Justification For Establishing A New Regulatory Category Or Imposing “Ad Hoc” Regulation.

Because cable modem service fits within the established regulatory categories of “cable service” and “information service,” there is no legal basis for the Commission to create a new regulatory classification, as suggested by the Competitive Policy Institute,^{73/} or to accept the Progress and Freedom Foundation’s invitation to “reexamine” its decision that section 706 does not grant the Commission authority to use “advanced telecommunications capability” as an alternative regulatory method.^{74/} Further, the Commission should decline SBC/BellSouth’s suggestion that it adopt an “intermediate” regulatory approach to equalize regulation of cable and DSL services^{75/} because, as discussed more fully below,^{76/} the nature and scope of statutory obligations imposed on ILECs is irrelevant to the proper legal classification of cable modem service.

II. FORCED ACCESS IS UNNECESSARY TO PROTECT CONSUMERS, AND WOULD IN FACT DISSERVE CONSUMERS

Even if the Commission had discretion to impose forced access requirements, there is no policy justification for doing so. The initial comments confirm that the market for Internet access service is competitive, and as a result, cable operators and ISPs are entering into commercially reasonable agreements that will provide consumers with a choice of ISPs. The competitive market will prevent any anticompetitive behavior that proponents of forced access speculate might occur.

^{73/} See Competitive Policy Institute at 2, 9-11 (suggesting that the Commission classify cable modem service in a new service category of services called “broadband Internet access services”).

^{74/} See Progress and Freedom Foundation at 13-15.

^{75/} See SBC/BellSouth at 23-25; *cf.* Verizon at 26 (proposing that the Commission impose nondiscrimination requirements, but not pricing and tariffing regulation, to DSL and cable modem service alike).

^{76/} See Section III, *infra*.

A. The Market For Internet Access Service Is Competitive.

Commenters from all segments of the communications industry agree with NCTA that, due in large part to the Commission's policy of "vigilant restraint," competition in the market for Internet access services is robust.^{77/} Further, competition is flourishing not only in the large metropolitan areas of our country, but "[t]he Commission's policy of regulatory restraint and allowing marketplace solutions to develop has worked extremely well in smaller markets."^{78/}

In addition to having access to the Internet via narrowband connections, the comments illustrate that increasingly, consumers have a variety of broadband access providers from which to choose.^{79/} "In addition to wireline services such as cable modem service and DSL, high speed access is provided via MMDS/ITFS, satellite, and other wireless platforms"^{80/} The Mercatus Center correctly recognizes that there are "many signs of intense competition" in the provision of broadband Internet access,^{81/} and notes that in addition to cable modem service and DSL, competitive options via satellite are already available nationwide and that competitive options are "expected to expand rapidly."^{82/} Cable & Wireless states that cable modem service, DSL,

^{77/} See NCTA at 39-48; *see also, e.g.*, American Cable Association at 3-13; American Electronics Association at 2-7; AT&T at 36-48; Cablevision at 4-12; Charter at 3-7; Citizens for a Sound Economy Foundation at 4-6; Comcast at 5-11; Cox at 5-12; Heartland Institute at 44-46; Information Technology Industry Council at 5-6; Progress & Freedom Foundation at 7-9; Metricom, Inc. at 5-6; Satellite Broadcasting and Communications Association, et al. at 3-6; SBC/BellSouth at 1-2; Telecommunications Industry Association at 19-23; USTA at 1-2, 8-12.

^{78/} American Cable Association at 10 (discussing findings of a survey of members of the American Cable Association).

^{79/} *See, e.g.*, Mercatus at 8 (noting that there is "intense" competition in the provision of broadband services); Satellite Broadcasting and Communications Association at 3 (stating that there is an "increasing range of broadband choices that are being made available to consumers by competing technologies"); SBC/BellSouth at 1 ("the market is young and growing extraordinarily fast"); Utilicom Networks at 2-3 (noting that the market is competitive with numerous providers of high-speed Internet access and that the Commission has expressly recognized "that xDSL, satellite, wireless and other providers present formidable and growing competition to cable Internet access" providers).

^{80/} Metricom, Inc. at 5-6.

^{81/} Mercatus at 8-9.

^{82/} *Id.* at 9.

fiber access, fixed wireless access, broadband mobile wireless access, and direct-to-home satellite are all competitive broadband technology platforms that “may be available to at least some consumers.”^{83/} The comments clearly demonstrate that “[c]ompetition between cable, DSL, fixed wireless, and satellite providers of high-speed Internet services is increasing.”^{84/}

The comments also demonstrate that because consumers have many choices among Internet access service providers, market forces are working to ensure that cable modem service consumers have access to multiple ISPs.^{85/} NCTA agrees with commenters such as the Progress & Freedom Foundation that because the market “is continuing to develop on a competitive basis,” broadband access providers, including cable operators, “will ensure the degree of openness which maximizes consumer needs,”^{86/} and with Metricom that “if consumers demand open access, service providers will be forced to conform or will risk losing customers to

^{83/} Cable & Wireless at 4-10 (discussing each alternative individually).

^{84/} Satellite Broadcasting and Communications Association, et al. at 3-4 (noting that in addition to cable modem service providers and DSL providers, “a host of terrestrial wireless providers,” and “two-way high-speed satellite service providers” are currently deploying high-speed services to consumers); *see also* American Electronics Association at 2 (noting that a “hands-off approach” will ensure “that consumers are provided with the greatest range of choices among service providers, whether cable modem service, ADSL, fixed wireless or satellite”); AT&T at 36-48 (“The deployment of competitive broadband service by various technology providers has continued at a breakneck pace”); Cablevision at 4-7 (explaining that competition is intensifying in the Internet access marketplace); Charter at 3-7 (citing competition from DSL and several wireless Internet access providers in its service territories); Comcast at 8-11 (noting that emerging competition in broadband services is coming from satellite and terrestrial wireless providers, television broadcasters and Part 15 device providers); Competition Policy Institute at 6 (arguing that cable modem service, DSL, and “other technologies, like satellite and wireless, will vie for the same customers”); Cox at 5-12 (discussing the “increasing number of companies beginning to offer competitive broadband services in Cox’s local markets”); Information Technology Industry Council at 4-7 (“according to the statistical evidence, current market forces are stimulating the rapid deployment of competing high-speed Internet access services”); Telecommunications Industry Association at 21-23 (stating that signs from DSL, satellite, and fixed wireless operators demonstrate “that healthy competition is developing”).

^{85/} *See, e.g.,* American Electronics Association at 7-12; AT&T at 43-66; Cable & Wireless at 12-14, 17; Cablevision at 12-14; Charter at 7-9; Comcast at 36-40; Competitive Policy Institute at 3-8; Cox at 17-21; Heartland Institute at vi, 43-46; Information Technology Industry Council at 6-7; Metricom, Inc. at 5-6; Millennium Digital Media at 5-7; Progress & Freedom Foundation at 9-10; RCN at 9-10; Satellite Broadcasting and Communications Association, et al. at 4; SBC/BellSouth at 13-14; Telecommunications Industry Association at 3, 24; Utilicom Networks at 7-8

^{86/} Progress & Freedom Foundation at 5-10.

competitors.”^{87/} Indeed, for this very reason, cable operators throughout the country are exploring ways to meet consumer demands by initiating trials to determine the most efficient means by which to offer multiple ISPs to consumers.^{88/} Further, as the American Cable Association points out, several cable operators have already “negotiated agreements for unaffiliated ISP access to the cable modem platform in smaller markets.”^{89/} Market forces, not regulations, have spurred this desire to meet the demands of the consumer.

Although some commenters argue that cable operators alone among multichannel video programming distributors should be subject to forced access,^{90/} the majority recognize that “[c]able modem service constitutes a tiny fraction of the Internet access market and cable providers do not possess the market power required to justify regulatory intervention.”^{91/} Cable’s lack of market power is in part a function of the significant deployment of competing broadband Internet access service by none other than EchoStar and RCN themselves.^{92/} The Commission

^{87/} Metricom, Inc. at 6.

^{88/} See NCTA at 48-50; *see also* Annenberg Public Policy Center at 9; American Electronics Association at 10-11; AT&T at 61-66; Charter at 7-9; Comcast at 37-38; Information Technology Industry Council at 7; Excite@Home at 11-14; RCN at 9-10.

^{89/} American Cable Association at 6-7.

^{90/} See, e.g., EchoStar at 3-6 (cable operators, but not satellite operators, should be subject to forced access requirements); RCN at 11 (if forced access requirements are imposed, they should only apply to incumbent cable operators).

^{91/} Information Technology Industry Council at 5-6; *see also, e.g.*, Charter at 1-7 (“the overwhelming majority (over 90%) of customers obtain access to the Internet using dial-up ISPs who use the existing copper of incumbent local exchange carriers; Comcast at 8-11 (“The market for Internet access services is already intensely competitive and still more competition is coming”); Cox at 8 (“Cox’s own experience in the Internet access marketplace only confirms the Commission’s conclusion that the market is competitive”); Heartland Institute at 44-45 (stating that in the Internet access market, “no cable television company could possibly have ‘market power’”); Telecommunications Industry Association at 19-20 (demonstrating that “cable modem providers do not have high market shares, and hence market power, in either of two hypothetical relevant markets: (1) residential Internet access, which consists of both narrowband and high-speed Internet connections, or (2) residential high-speed Internet access”); Information Technology Industry Council at 6 (“[w]hile there is no evidence that cable modem providers wield market power in the Internet access market, there are many indications that robust competition in that market *is* emerging and consumer choices have increased”).

^{92/} See, e.g., EchoStar at 9. Ironically, StarBand, the broadband Internet satellite service operated by EchoStar, Gilat and Microsoft, reportedly itself requires customers who sign up for the system through Radio Shack to buy

should reject the obviously self-serving proposals by cable's competitors to impose new and cumbersome rules on cable operators.

B. Market Forces Will Prevent Anticompetitive Behavior By Cable Operators.

Forced access is unnecessary to prevent anticompetitive behavior by cable operators. Cable operators already face a tremendous challenge in deploying cable modem services because they start with no embedded Internet customer base. Their business models, therefore, focus on attracting and retaining customers. As new facilities-based entrants competing against the ILECs, cable operators' strategies and business models must be and are aimed at delivering consumers maximum value and nothing less, in order to attract consumers away from dial-up, DSL, and other competing broadband services. And contrary to speculation by some commenters,^{93/} cable operators lack the ability or the incentive to leverage their provision of video services to secure monopoly prices in the provision of broadband service, implement anticompetitive policies regarding caching, or restrict access to unaffiliated Internet content.

1. Cable operators have no monopoly in the provision of video service, and in any event, such a monopoly could not be leveraged into the provision of broadband service.

Several commenters erroneously assert that because "[c]able companies have historically faced no direct competition in the video programming arena," they will leverage the market power "to the operation of cable Internet access."^{94/} Contrary to these unfounded assertions, cable does not monopolize the provision of video programming. Even if such a monopoly did

a Compaq computer and receive Internet service from MSN. "No Cable, No DSL? Try Satellite," *New York Times*, Nov. 23, 2000.

^{93/} See, e.g., Association of Communications Enterprises at 20; Big Planet at 9-12; Circuit City at 6-7; Competitive Access Coalition at 31-35; Competitive Telecommunications Association at 19-21; Consumers Union, et al. at 9-11; OpenNet at 8-10; 20-21; Pegasus at 9-10; Verizon at 34; WorldCom at 3-4, 20.

^{94/} OpenNet at 20-21; Worldcom at 1-2.

exist, cable companies could not use it to gain a dominant position in the provision of broadband services.

a) Cable does not monopolize the provision of video programming.

The argument that cable has a monopoly in the provision of video service – whether or not that was ever so – is now without serious dispute grossly outdated and at odds with the facts. Over the last five years, DBS has undergone a remarkably rapid growth, with steady increases year after year. Further, this growth has not been limited to rural areas where cable is unavailable.⁹⁵ Rather, the marketing campaigns of the DBS companies have been directly targeted at cable subscribers in urban and suburban communities, and surveys have shown that the majority of new DBS subscribers are former cable subscribers.

Last year, Congress removed what DBS operators identified as their last remaining regulatory obstacle – their inability to retransmit their subscribers’ local broadcast stations. And this year’s statistics show another growth spurt. Between July 1999 and July 2000, DBS added almost 3 million new subscribers – more than in any previous year, and three times as many as cable added during the same time period. DBS now has 15.25% of all subscribers to multichannel video program distributors (“MVPDs”), and cable’s share has dropped to 79.62%. DirecTV now has more subscribers nationwide than all but the top two cable multiple system owners (“MSOs”). Only five MSOs rank ahead of EchoStar.

In addition to the established presence of DBS, new terrestrial competitors are also emerging to join the already vigorous and permanent state of competition among video

⁹⁵ See *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1, Seventh Annual Report, ¶66 (rel. January 8, 2001) (“DBS subscribership is growing in urban and suburban communities and is no longer viewed as a predominately rural service.”)

providers. This year, the opportunity to provide “full-service” packages of voice, video and data services has made it economical for a proliferation of new multi-service providers to enter the marketplace with competitive wireline “overbuilds.”^{96/} As a result, more and more consumers are choosing competitive alternatives to cable. It is now more apparent than ever that consumers will face a larger and larger *supermarket* of competitive alternatives in their communities. Given these alternatives, arguments that cable “monopolizes” video service to consumers must fail.

b) Competitors can easily replicate any benefit cable might obtain from offering both video and broadband service.

If there is a benefit to offering video and broadband service as a package to subscribers, any competitor can easily form a competing service package. DBS providers, for example, not only offer video service, but have launched or announced plans to launch broadband service.^{97/} And DBS providers’ nationwide footprint enables them to offer service to the entire country,^{98/} something no cable operator can do. Even entities that do not offer both video and broadband service can enter into joint ventures or joint marketing agreements, thereby gaining all the benefits allegedly held by cable operators through this means as well.^{99/} If a particular satellite operator or other competitor is not currently offering broadband service, it can enter into a joint

^{96/} For instance, companies such as RCN and Digital Access have begun to target specific markets throughout the country in an effort to offer a variety of communications services. A “Donaldson, Lufkin & Jenrette analyst’s report outlined about 15 other companies of [RCN’s] kind -- called *overbuilders* -- around the country. “Comcast Has a Battle on its Hands,” *Philadelphia Inquirer*, June 11, 2000.

^{97/} See, e.g., AT&T at 43, 45-46; Cable & Wireless at 4, 6, 9; Comcast at 9; Charter at 4; EchoStar at 5, 9; Pegasus at 2-3, 5-7; Satellite Broadcasting and Communications Association et al. at 3-6; Starband at 1-2, 4-6. Similarly, telephone service providers are well positioned to offer bundled telephony and Internet service.

^{98/} See Cable & Wireless at 6, 9; Pegasus at 5-7; Starband at 2-3.

^{99/} For the same reasons, EchoStar’s assertion (at 8) that cable operators could use the opportunity to offer an integrated video/broadband service package to increase their market power in the provision of video fails. Cable has no monopoly power in either the provision of video or broadband service; DBS subscribership is rising; and DBS providers can offer the same ‘one-stop’ shopping for video and Internet access service that cable operators can.

agreement with a broadband service provider under which each markets the other's service.

Indeed, Verizon and DirecTV have entered into precisely such an arrangement.^{100/}

In the AT&T/TCI merger proceeding, the Commission rejected the argument that the merged entity could gain an anticompetitive advantage by bundling services. The Commission there held that "AT&T/TCI could inflict competitive harm by offering a package of bundled products only if rivals could not offer a similar package – that is, only if the merged firm enjoys a monopoly in one of the bundled services,"^{101/} but went on to find that alternative packages were in fact available. As demonstrated above, the same is true here.

c) There is no economic incentive to use a monopoly in video to subsidize broadband offerings.

Even if cable operators had a monopoly in the provision of video programming, as some commenters incorrectly contend,^{102/} they would have no economic incentive to cross-subsidize their broadband business. The Commission has recognized the weakness of this argument, dismissing identical concerns when they arose in its review of the AT&T/TCI merger. The Commission got it right then, and nothing has changed to require or support a different analysis.

In *AT&T/TCI*, the Commission evaluated the potential for cable operators to "exercise . . . market power to charge unreasonable cable rates" or "use . . . revenues derived from such rates to subsidize other services [such as telephony or broadband] . . . and thereby gain an

^{100/} See *BellSouth Shifts Services for Data-Driven Focus*, at <http://news.cnet.com/news/0-1004-200-4220410.html?tag=st.cn.sr.ne.2> (Dec. 19, 2000) (noting that Verizon and SBC have entered into such agreements with DirecTV, and "BellSouth has teamed up with EchoStar Communications to sell its customers satellite television service").

^{101/} *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc., Transferor To AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3218 ¶ 126 (1999) ("*AT&T/TCI Order*").

^{102/} See, e.g. *OpenNet* at 20-21; *WorldCom* at 1-2.

anticompetitive advantage for the sale of the other services.”^{103/} Noting at the outset that such contentions were “speculative at best,”^{104/} the Commission nevertheless identified and evaluated two potential “predation strategies” and concluded that neither was a rational strategy for cable operators to pursue.

The Commission concluded that the first strategy, which it called “simple predation” – under which cable monopolists would take their monopoly profits and use them to subsidize other services at below-cost, below-competitive level prices – made no sense because “[t]here is . . . no reason to believe that sacrificing monopoly profits, should they be available, in cable to obtain monopoly profits, should they be attainable, in [the other] service would be a profit-maximizing strategy” and because “[i]t appears unlikely that the merged firm would have any incentive to raise cable rates simply to subsidize other services and drive out competitors for those services.”^{105/} Put more generally, a cable operator already charging monopoly prices for video services would not dissipate its monopoly profits to underprice broadband services unless it could be assured of a monopoly in broadband. Given the wide array of competitive broadband providers, however, such a strategy would inevitably fail.^{106/} If the cable “monopolist” tried to recoup its investment by raising broadband prices, other broadband providers such as telephone and satellite companies would respond by activating capacity. Apart from the lack of economic incentives to engage in such pricing practices, federal and state laws proscribe them.^{107/}

^{103/} *AT&T/TCI Order* 14 FCC Rcd at 3214-15 ¶ 116.

^{104/} *Id.* at 3215 ¶ 117.

^{105/} *Id.* at 3215-16 ¶ 118.

^{106/} *Cf. id.* (“the presence of extensive sunk facilities in both the local and interexchange markets suggests that the [operator] would be unable successfully to raise prices after the competitors were driven out of the market”).

^{107/} *Id.*

The Commission dismissed the second strategy – “regulatory predation” – as irrelevant to the cable market. Under a “regulatory predation” approach, a firm that enjoys market power in one product, where the price of that product is regulated, can find it profitable to enter a business whose costs can be shifted to the regulated product’s production.^{108/} As the Commission recognized, however, cable operators are unlikely to profit from regulatory predation and thus it would be economically irrational to engage in such behavior. First, cable operators “have an economic interest in preserving and expanding [their] existing cable subscriber base” in order to increase cable service revenues and maximize their access to customers for marketing new service offerings.^{109/} Raising cable rates risks losing existing and potential customers. Second, cable operators are not subject to rate-of-return regulation. Without the incentive to inflate a rate base that is guaranteed a rate of return, cable companies have no incentive to cross-subsidize broadband services by shifting costs from broadband to the cable side of the business. To the contrary, an increase in cable rates could result in a loss of subscribers and a possible decrease in profitability.^{110/}

The lack of cable operator incentive to engage in anticompetitive cross-subsidization explains why none of the handful of commenters advancing this claim supported their allegations with any analysis. Their unsupported speculations rely wholly on the belief that regulators will accept such arguments because of their purported negative perception of the cable industry or because of an uncritical acceptance of the notion that simple predation is a rational strategy for a monopolist. A theory that the Commission has already recognized as mere speculation –

^{108/} *Id.* at 3216 ¶ 119.

^{109/} *Id.* at 3216-17 ¶ 120.

^{110/} *Id.*; see also *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking, 12 FCC Rcd 5639, 5657-58 ¶ 38 (1997) (even “if the MVPD is an unregulated monopolist serving both competitive and non-competitive markets with no limits on its

particularly, speculation that withers in the face of analysis – cannot be the basis for significant regulation of an emerging industry.

2. Cable operators have no ability or incentive to control subscribers’ access to Internet content through caching or any other means.

In the competitive broadband marketplace, cable operators have strong incentives to offer subscribers the most complete service package available. Consumers expect and demand unhampered access to the Internet content of their choice,^{111/} and would not tolerate the types of behavior envisioned by proponents of forced access. A cable operator that attempted to control subscribers’ use of the Internet and eliminate unaffiliated content providers’ ability to reach consumers by steering subscribers to affiliated content through caching or any other means^{112/} would fail to gain new customers and quickly lose its existing customers to its competitors.

As NCTA demonstrated in its initial comments, for instance, caching is not a tool that is used to disadvantage unaffiliated content. Caching is used by cable operators to bring popular content closer to the end user and thereby enable access without the delays caused by congestion on the public Internet.^{113/} Content is cached automatically based on the frequency of customer visits, not affiliation with the cable operator. Content providers whose websites do not generate sufficient traffic to trigger automatic caching can purchase caching services from third parties like Akamai that are in business precisely to provide these capabilities in the marketplace.^{114/}

profits, there is no incentive for it to ‘cross-subsidize’ costs, since such action would reduce the MVPD’s monopoly profit.”); *see also* NCTA at Attachment 1 2-7.

^{111/} NCTA at 55; *see also* AT&T at 37-38, 49-50; Cablevision at 3-4, 13-14.

^{112/} *See, e.g.,* A+Net at 4; Association of Communications Enterprises at 20; Big Planet at 8-13; Circuit City at 6-7; Competitive Access Coalition at 37-39; Competitive Telecommunications Association at 19-21; Consumers Union at 3-5; OpenNet at 8-10; Pegasus at 9-10; USTA at 19; Verizon at 34; WorldCom at 4.

^{113/} NCTA at 55-56.

^{114/} *See id.* at 56.

Neither caching nor any other alleged benefit of affiliating with a cable operator would allow cable operators to control the success or failure of Internet content providers. Cable operators ensure a fully “open” customer experience by enabling subscribers to reach any available Internet content regardless of whether it is affiliated with the cable operator.^{115/} The very nature of the Internet invites the creation of innumerable sources of content, to which cable subscribers have access. In this environment, cable operators and other ISPs may identify “preferred” content through on-screen links, but the ready availability of competing content providers precludes any ISP from “controlling” a subscriber’s Internet experience. Attempting to limit content choices would only lead to dissatisfied customers, who would turn to one of the many alternative providers. Forced access is unnecessary to ensure that Internet users can continue to be able to access as much of the Internet as they choose.^{116/}

C. The AOL-Time Warner Consent Order Does Not Support Imposing Generally Applicable Forced Access Requirements.

The recent decision of AOL-Time Warner to enter into a Consent Order with the Federal Trade Commission (“FTC”) requiring the merged entity to make a choice of ISPs available to its subscribers does not support the imposition of government-mandated access requirements on any other cable company or the cable industry at large. To the contrary, the Consent Order was based explicitly on the unique factual circumstances presented by the AOL-Time Warner merger

^{115/} See, e.g., *id.* at 55-56; AT&T at 37-38, 49-50; Cablevision at 3-4, 13-14; Charter at 19; Comcast at 31-32, 38; Cox at 19.

^{116/} For this reason, the argument of consumer groups that forced access is necessary to protect the public’s First Amendment rights “to speak to one another, to be publishers and broadcasters as well as readers and listeners” (Media Access Project at 3-11) is fatally flawed. Media Access Project speculates that without forced access, “[t]he technology necessary to target and eliminate certain content . . . will be used to alter citizens’ ability to reach the content they both wish to find and to distribute.” *Id.* at 9. This threat, it argues, poses a threat to First Amendment values by lessening the diversity of media voices. See Media Access Project at 4-6; City of Los Angeles at 5-6. As demonstrated herein and in NCTA’s initial comments, however, cable operators have no incentive or ability to restrict consumers’ ability to access Internet content. See NCTA at 55-56; see also AT&T at 37, 49-50; Cablevision at 14; Charter at 2, 8; Comcast at 31-32; Cox at 17-19. As the *Broward* court recently recognized, the real First Amendment harm would be caused by the imposition of a forced access requirement

that do not apply to any other cable operator. Moreover, it goes without saying that parties may be willing to agree to a consent decree in order to obtain merger approval even though the terms of such a decree would not necessarily be warranted or good policy if applied to an entire industry.

Every merger is unique – the AOL/Time Warner merger is no exception. The FTC found that AOL, with nearly 28 million members, is “the leading provider of narrowband internet access” and “is positioned and likely to become the leading provider of broadband internet access as well.”^{117/} Time Warner is the second largest cable operator, and also owns “a wide conglomeration of entertainment or media businesses,” including Road Runner, the nation’s second largest provider of cable broadband ISP service.^{118/} The FTC alleged that the merged entity’s significant customer base, combined with Time Warner’s extensive cable systems, would render new entrants unable to compete.^{119/} The FTC therefore deemed it necessary to impose a government-supervised access requirement, which tracked the terms of the AOL-TW Memorandum of Understanding,^{120/} in order to prevent a “loss of competition in broadband Internet access service.”^{121/}

No other cable operator possesses the assets that prompted the FTC to impose forced access conditions on AOL/Time Warner. No other cable operator serves more than a small fraction of the embedded Internet customer base of AOL. If anything, the Consent Order

that restricts cable operators’ constitutionally protected editorial discretion to determine which services they will offer. *See* NCTA at 38-39.

^{117/} Draft Complaint, *In the Matter of America Online, Inc. and Time Warner, Inc.*, Docket No. C-3989 (Dec. 14, 2000), at ¶ 8.

^{118/} FTC Analysis of Proposed Consent Order to Aid Public Comment at 1.

^{119/} *Id.* at 2 (“the merger will increase the ability of the combined firm to unilaterally exercise market power in Time Warner cable areas and throughout the United States”).

^{120/} *See* Memorandum of Understanding Between Time Warner, Inc. and America Online, Inc. (Feb. 29, 2000).

^{121/} Draft Complaint, Count I.

demonstrates how very inappropriate forced access requirements are for other cable operators that lack the characteristics on which the FTC's access requirements were based.^{122/}

Finally, the FCC – not the FTC – is the expert federal agency with respect to telecommunications policy matters. The FTC's merger review process should not be confused with an FCC Notice of Inquiry or Rulemaking proceeding which is designed to afford due process to all interested parties in an open and public administrative proceeding dealing with general, industry-wide policy issues. The conditions placed by the FTC on the AOL/Time Warner merger do not change the fact, confirmed in the FCC's numerous reviews of the marketplace, that high-speed Internet service is developing very competitively and no industry-wide forced access requirements are appropriate.

III. “REGULATORY PARITY” CONCERNS DO NOT JUSTIFY THE IMPOSITION OF FORCED ACCESS REQUIREMENTS ON CABLE OPERATORS

While ILEC commenters spend considerable time arguing that the telephone and cable industries should be treated “equally,” they ignore the factors that give rise to the different regulatory treatment accorded cable operators and incumbent telephone companies. This proceeding is about whether or not to mandate access to cable's network. The outcome of that inquiry depends on an analysis of the law, the market for Internet access service, cable operators' role in that market, and the potential for competition in the absence of forced access. As discussed above, an evaluation of each of these factors confirms that the Commission's policy of “vigilant restraint” is the correct course of action.

How ILECs' DSL service is regulated is not relevant to whether the Commission can or should impose forced access requirements on cable operators. Congress adopted a unique regulatory framework for ILECs, and it would be wholly inappropriate for the Commission to

^{122/} In fact, it is not uncommon for antitrust regulators to impose requirements on a merger approval that go beyond the regulatory requirements that are deemed sufficient for the rest of the industry.

impose burdensome and unnecessary regulatory requirements on cable operators in this or any other proceeding for the sake of altering a playing field established by Congress. As NCTA demonstrated in its initial comments, there are a variety of differences between the two industries that explain why Congress chose to regulate ILECs and cable operators differently.^{123/} The ILECs are free to seek relief from their obligations in Congress or before the Commission – as they are doing – but that debate is for another day, and is certainly not for this proceeding.

Even through the lens of “regulatory parity,” the ILECs’ forced access arguments fail. First, their DSL service is not regulated as heavily as their comments suggest. The Commission has exempted DSLAMs as well as packet switching from any unbundling requirements, thus freeing from regulation any transmission functionality beyond the central office associated with DSL service. Further, in ILEC mergers, the Commission has allowed ILECs to set up separate affiliates to provide unregulated data services.^{124/} ILEC local loops remain subject to unbundling requirements, even for the provision of DSL, because the Commission has found that those loops remain a bottleneck facility.^{125/} And DSL remains subject to common carrier regulation because

^{123/} See NCTA at 65-67.

^{124/} See *In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221, ¶¶ 260-284 (2000); *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14859-67 ¶¶ 363-376 (1999). DSL unbundling requirements do not appear to be causing ILECs any marketplace harm. Approximately eighty percent of ILECs’ DSL traffic comes from their own affiliated ISP. See NCTA Comments Attachment B at 5-6 (noting, in addition, that DLECs account for under 7% of the residential DSL market).

^{125/} See *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912, 10926 ¶ 25 (1999) (“*Line Sharing Order*”) (mandating CLEC access to the high-frequency portion of the ILEC’s local loop); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3772 ¶ 165 (1999) (“[r]equiring carriers to obtain loops from alternative sources would materially raise entry costs, delay broad-based entry, and limit the scope and timeliness of the competitor’s service offering”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and*

the Commission has held that it is a telephone exchange or exchange access service.^{126/} Even this holding is on appeal to the D.C. Circuit, however. If the ILECs are correct that DSL is not a telecommunications service, and the Act does not require any elements of DSL service to be unbundled, all aspects of DSL service will be deregulated. If the FCC is upheld, the ILECs should seek relief from Congress rather than regulation of their competitors.

Verizon's arguments that regulating cable modem service and DSL service differently would violate the Administrative Procedure Act, the First Amendment, and the Fifth Amendment are similarly inappropriate. As a threshold matter, Verizon presents these arguments in support of equal treatment of cable and ILECs in a hypothetical forbearance proceeding.^{127/} Since cable modem service is not a telecommunications service, however, a forbearance analysis is irrelevant. Any disparity between the statutory treatment of cable modem service and DSL is a matter for Congress.

Even assuming that cable modem service were a telecommunications service and forbearance were therefore relevant, Verizon's arguments that forbearance for cable alone would violate the APA and Fifth Amendment are based on the faulty assertions that cable modem service and DSL service are "indistinguishable" and that cable operators and ILECs offering DSL pose identical risks to competition. As NCTA and others noted in their initial comments, Congress had solid grounds for treating ILECs uniquely.^{128/} Verizon's arguments that Congress may "not treat like cases differently," and may not "improperly discriminate between similarly

Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd 15499, 15690 ¶¶ 377-378 (1996). In denying ILEC demands for the imposition of forced access on cable operators, the Commission found by contrast that cable operators did not exercise similar market power. See *Line Sharing Order*, 14 FCC Rcd at 20941-42 ¶¶ 58-59 (noting that "the Act explicitly makes distinctions [between cable operators and ILECs] based on a common carrier's prior monopoly status").

^{126/} See *Remand Order*, 15 FCC Rcd at 391-406 ¶¶ 15-45.

^{127/} Verizon at 29-40.

^{128/} NCTA at 66; AT&T at 88-98; Comcast at 18-24.

situated services without a rational basis”^{129/} ignore the bases for this distinction. It is well established that “Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field.”^{130/} And contrary to Verizon’s suggestion,^{131/} the decision to impose common carrier regulation on ILECs but not on cable is obviously not content-based and would therefore easily pass First Amendment muster.

IV. FORCED ACCESS WOULD RESULT IN EXCESSIVE GOVERNMENT INVOLVEMENT IN A STILL-NASCENT INDUSTRY

Proponents of forced access present a vast array of regulatory demands that confirm NCTA’s prediction that such a requirement would draw the Commission into lengthy and complicated proceedings far beyond mandating multiple ISP availability to consumers. Resolution of the many technical issues that would necessarily arise from a forced access mandate would require additional regulatory involvement and oversight. Finally, recent developments in the Internet marketplace underscore the inappropriateness of regulatory intervention in an unsettled marketplace. The Commission should not impose new regulations on new participants in a marketplace that is finding its way.

A. Forced Access Requirements Would Necessarily Result in An Expansive Regulatory Scheme Requiring Continuing Government Oversight.

Even before the Commission initiated this proceeding, the proponents of forced access submitted an extensive list of demands for regulation of cable operators.^{132/} The comments in this proceeding provide further evidence, if any were needed, of the extensive regulatory regime

^{129/} Verizon at 32-33 (internal citations omitted).

^{130/} *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 184 (1946).

^{131/} Verizon at 35-37.

^{132/} See NCTA at 59-60 (discussing the litany of demands associated with a forced access regime that have been made to the Commission).

that forced access would engender.^{133/} It is now beyond question that implementing forced access would require a complex level of government intervention and that proponents of forced access themselves cannot agree on how the Commission should structure such a regime.

As an initial matter, each commenter has a different opinion on what forced access means and how it should be implemented.^{134/} Some commenters state that the Commission should structure forced access based on a leased access model.^{135/} Others believe that a leased access model does not go far enough,^{136/} and OpenNet believes that the Commission “should consider its wireless interconnection rules as a model” to implement forced access.^{137/} Others maintain that forced access must “draw upon principles embodied in Sections 251 and 252 of the Communications Act.”^{138/} Each of these approaches would result in a vastly different forced access scheme, but all of them would require complex regulatory proceedings to implement. At a minimum, as one proponent of forced access acknowledges, implementing any of these forced

^{133/} See, e.g., A+ Net at 11-12; Annenberg Public Policy Center at 1-4; Association for Maximum Service Television, Inc. at 3-10; Center for Democracy & Technology at 13-18; Competitive Access Coalition at 37-39; CompTel at 3-4, 16-19; Consumers Union, et al. at 20-22; EchoStar at 8-9; OpenNet at 19-26; National Association of Towns and Townships, et al. at 7-15.

^{134/} As the Cable Services Bureau has concluded, the inability of forced access proponents to agree on what “open access” means “speaks volumes about the difficulties and appropriateness of establishing a regulatory regime at this early stage in broadband’s history.” BROADBAND TODAY, A STAFF REPORT TO WILLIAM E. KENNARD, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, ON INDUSTRY MONITORING SESSIONS CONVENED BY CABLE SERVICES BUREAU (Cable Services Bureau, October 1999) at 38.

^{135/} See, e.g., A+ Net at 4-11; Competitive Access Coalition at 41-42; National Association of Towns and Townships, et al. at 7-15. The leased access model is unworkable as applied to the ISP context. In particular, the leased access pricing rules assume that each unaffiliated party is being given a dedicated channel to deliver a video programming service similar to what affiliated entities are providing. In this context, it is reasonable to assume that a lease rate can be derived by analogy to what affiliated programmers are “paying” for carriage. By contrast, each ISP places very different demands on the cable system. Rather than the uniform rate and standard contract that are the norm in leased access, the cable operator-ISP agreement must be individually tailored to reflect their unique relationship.

^{136/} One commenter, for example, demands that the Commission implement a forced access regime that is based on the “program access rules, the nondiscrimination rules for open video systems, and the good faith negotiation requirements established by the Commission pursuant to the Satellite Home Viewer Improvement Act of 1999.” Association for Maximum Service Television at 9 (internal citations omitted).

^{137/} OpenNet at 19 n.45.

^{138/} Consumers Union, et al. at 20-22.

access approaches would require a “highly complex understanding of the policy and regulatory elements” behind these various regulatory structures.^{139/} The Commission could not arrive at such an “understanding” without devoting a significant amount of time, effort, and scarce resources to evaluating each of these options.

The demands associated with forced access also go far beyond suggestions for regulatory models for implementing forced access. Each proponent of forced access also has its own idea of what a forced access regime should involve. One ISP lists fifteen separate criteria that “[a]t a minimum, [a] national and enforceable open access policy must include.”^{140/} Another commenter maintains that the Commission must engage in a costly monitoring and oversight regime that would require new broadband entrants to report service quality and other operational data to the Commission.^{141/} Yet another insists that the Commission “open a rulemaking on which it can consider the formation of independent cable modem platform administrators (ICMPAs) or gatekeepers to establish and administer interconnection tariffs and standards.”^{142/}

Some comments make demands that go far beyond the issue – the availability of multiple ISPs on broadband platforms – that is the focus of this proceeding. EchoStar demands that the Commission require cable operators to make available its system to all “content providers” and to provide access to competing MVPDs.^{143/} EchoStar also proposes that the Commission mandate the availability of cable’s return path to DBS companies because they “do not have a return link from the home to the satellite and cannot at this point in time practically or reasonably

^{139/} *Id.* at 20.

^{140/} A+ Net at 11-12.

^{141/} *See* Annenberg Public Policy Center at 1-6.

^{142/} National Association of Towns and Townships, et al. at 11; *id.* at 11-14.

^{143/} *See* EchoStar at 8-9.

duplicate” the broadband services being offered by cable providers.^{144/} Yet in the very next sentence, EchoStar describes how it is participating in the StarBand two-way joint venture and is developing a next-generation broadband solution involving satellite use of the Ka-band.^{145/} As the FCC has time and again reminded the nation, the goal of public policy is to protect competition, not competitors.^{146/}

The comments further demonstrate that mandating forced access would embroil the Commission in numerous complex technical issues.^{147/} While many commenters seek to dismiss these issues as trivial,^{148/} those parties closest to the cable operator trials testing multiple ISP availability confirm that numerous issues remain and that different approaches to unaffiliated ISP availability may be necessary to fit the individual structure of each cable operator’s system. Indeed, even the Competitive Access Coalition acknowledges that “deciding which is the technically superior location to interconnect” is a “technical[ly] complex[] matter.”^{149/} Rather than justifying a rulemaking, as the Coalition suggests, these complexities are best resolved through

^{144/} *Id.* at 9.

^{145/} *Id.*

^{146/} NCTA at 53 & n.185; *see also* Charter at 29-31..

^{147/} *See, e.g.,* AT&T at 59 (discussing technical issues, including “the physical integrity of the network and its related facilities,” and “questions regarding allocation of network space, costs of upgrade, and other issues regarding the use of the network”); Center for Democracy and Technology at 6, Exh. 1 55-59 (noting the “very challenging technical concerns that arise because the cable plant is inherently a shared resource; Charter Communications, Inc. at 9-20; Comcast at 32-35 (discussing the range of technical issues the Commission must face should it impose forced access); Excite@Home at 11-14 (noting that several technical issues such as shared bandwidth, provisioning, and IP address allocation need to be addressed); New Hampshire ISP Association at 9 (noting that it “is (barely) technically feasible to have multiple ISPs managing the traffic to each customer, by setting aside bandwidth for each ISP” and that this solution has very poor scalability); StarBand at 15-16 & n.27 (“[i]n any case, it is far from clear that a workable open access standard can be successfully mandated by regulation”); Telecommunications Industry Association at 24 (“[i]t could take years for the Commission to sort out all of the various technical and cost issues associated with open access agreements”).

^{148/} *See, e.g.,* Competitive Access Coalition at 69-75; CompTel at 9-10; Earthlink at 27; National Association of Towns and Townships at 7-9; SBC/BellSouth at 33-35; WorldCom at 5-6.

^{149/} Competitive Access Coalition at 73. Even assuming the two points of connection specified by the Coalition were the most appropriate today, improvements in network infrastructure will likely make it possible for suitable points of connection to be located at places more distant from the headend. The prospects for this sort of

individually tailored business negotiations between operators and ISPs. It is unwise to expect that the Commission could impose a “one size fits all” technical solution through a forced access requirement.

As the foregoing makes clear, a forced access mandate would result in an overly burdensome and extensive regulatory regime not likely to result in consumers having multiple ISP options any faster than marketplace solutions. Additional support for this point can be found in the comments submitted by those familiar with the forced access regime in Canada.^{150/} As François D. Ménard observes, Canada’s attempt to impose forced access has failed. According to Ménard, Canadian and industry officials have become bogged down in an attempt to resolve significant technical issues surrounding forced access that have delayed the implementation of multiple ISP availability to the cable operator’s subscribers. Participants in the Canadian process have disagreed over such basic issues as how to define “points of interconnection” and the equipment used to provide source-based routing.^{151/} By saddling the public, affected industries, and the government with the burdens of implementing and enforcing a complex, ongoing regulatory regime, the Canadian experience demonstrates that government-mandated access is far inferior to reliance on market forces to ensure subscriber choice.

B. Burdensome Regulatory Requirements Are Inappropriate In Nascent Industries.

Industries that are still developing need freedom and flexibility to respond to constantly shifting marketplace demands and interest levels. The Internet economy as a whole is still evolving, and myriad Internet providers already have come and gone as companies strive to

technical evolution offer an additional argument against the adoption of a regulatory scheme that is ill-suited to adapt quickly to such changes.

^{150/} See François D. Ménard at 2.

^{151/} See Ménard at 8-11.

develop business plans that can both meet consumers' changing levels of interest and succeed in the marketplace. The downturn of the Internet economy in the past several months demonstrates the extent to which companies in the Internet sector must have the freedom to adapt quickly in an ever-changing industry. Indeed, many companies that provide broadband services to unaffiliated ISPs have been among the worst hit thus far in the Internet sector. One of the main reasons these broadband leaders are in dire straits is that "[m]any cash-strapped Internet service providers can't pay their bills."^{152/} Cable operators, too, have seen a significant drop in market capitalization over the past year.^{153/}

Imposing complicated and burdensome regulation would lock these companies into particular business models and hamper their ability to respond to changes in the marketplace.^{154/} Internet business models are and must be as dynamic as the marketplace. They must evolve to surmount the technical hurdles facing a particular entity^{155/} and, most importantly, to meet the demands of consumers. The Commission must not pigeonhole these evolving entities into any particular business model through regulation.

^{152/} John Shinal, *Broadband's Pioneers May Get Beaten, Then Eaten*, BUS. WK., Dec. 4, 2000, at 42.

^{153/} See *Investment Outlook Scoreboard*, BUS. WK., Dec. 25, 2000, at 138, 161, 168 (noting, for example, that AT&T's 2000 market price (as of date of publication) was down 61%, Cox was down 23%, Comcast down 24%, and Charter down 10%).

^{154/} See *The Great Digital Broadband Migration*, Remarks of Commissioner Michael K. Powell before The Progress & Freedom Foundation, Dec. 8, 2000 (stating that the Commission "must foster competitive markets, unencumbered by intrusions and distortions from inapt regulations. And, most importantly, [the Commission] ha[s] to be careful to see speculative fear and uncertainty in this innovation-driven space for what it is, and not prematurely conclude we are seeing a market failure that justifies regulatory intervention"); see also Charter at 24-26 (noting that "[t]o force only one economic model onto the Internet, in which transport must be priced independent of content or advertising, would significantly distort the developing market for Internet services and may have a severe negative impact on consumer Internet service options").

^{155/} Charter illustrates this point with its discussion of "tag switching," a new routing technique that has emerged within the past year and that Charter believes "is the leading candidate for supporting choices of ISPs over cable." Charter at 15 (noting that regulations that force a particular type of technological solution upon cable operators "at this time could very likely stifle the pace of innovation, which is so dramatic in Internet-related methodologies and equipment").

C. Demands for Regulation of “Interactive Television” Are Unjustified.

Only a few commenters responded to the Commission’s invitation to discuss interactive television (“ITV”) issues, but their demands to extend government-mandated access to ITV^{156/} demonstrate the potential breadth of a forced access regime. If anything, the case for requiring access to a cable operator’s ITV platform is even less supportable than mandatory access for ISPs.

ITV is at an even earlier developmental stage than high-speed Internet access. Indeed, most cable operators have not even determined how, if at all, they will use or offer ITV. ITV is not yet available in most places, and the very concept of “ITV” itself is not remotely subject to a uniform definition at this point in its development. The imposition of burdensome regulations in advance of any evidence that they are warranted will only serve to stifle the development of this promising service.^{157/} As NCTA explained in its initial comments, regulatory intervention is justified only where there is an identifiable failure in the marketplace. Here, the earliest reports suggest a vibrant market for the provision of ITV.^{158/} The CEO of Wink has specifically advised against the regulation of ITV, telling Congress that she has entered into partnerships with more than 90 companies without government assistance.^{159/}

^{156/} See, e.g., Association of America’s Public Television Stations at 3-5 (stating that “principles of nondiscriminatory prices, terms and conditions should extend not only to the basic cable system, but also to the functions embedded in cable modems and set-top boxes”); Association for Maximum Service Television at 4-10 (demanding that the Commission initiate a rulemaking proceeding to ensure that all independent entities “including providers of EPGs [(electronic programming guides)], interactive television services, and other analog and digital television services” have access to the cable platform); Circuit City at 4-5 (demanding that the Commission should require cable operators to provide access to all navigation devices).

^{157/} See AT&T at 99-103 (noting that the interactive television market still must resolve several important questions about technology, service, and consumer preference); Cablevision at 16-17.

^{158/} See AT&T at 103-05 (noting numerous providers of ITV technologies and services). See also Cablevision at 16-17 (stating that the Commission should “avoid conflating the issue of access to cable broadband networks for unaffiliated ISPs with any issues associated with the nascent market for interactive television services”).

^{159/} Statement of Maggie Wilderotter, CEO, Wink, Inc., *Hearing on Interactive Television before the Telecom., Trade, and Consumer Protection Subcom. of the House Commerce Comm.*, 106th Cong. 2d Sess. (Oct. 6, 2000).

The lack of comments on ITV issues in this proceeding confirms that it is far too early to consider a forced access mandate on the provision of interactive television. Moreover, as NCTA and others have pointed out, the question of whether such a requirement may someday be justified is not even appropriate for this proceeding. The fact that some of the interactive content used in an ITV service may be kept on the Internet does not mean that ITV is an Internet service. For ITV, the Internet is simply a place where interactive data is stored, rather than a critical or necessary aspect of the service.^{160/} In this central regard, ITV raises different policy issues than those being considered in the instant docket. If the Commission wishes to explore the early direction of the development of ITV, a separate Notice of Inquiry keyed specifically to ITV is the most appropriate vehicle. Certainly it would be unwise and unwarranted prior to conducting such a proceeding to presume the need for ITV rules. As the Commission wisely concluded in the context of Internet access, regulators must proceed cautiously before extending government mandates to new services. That is as much the case, if not more so, with regard to ITV.

^{160/} AT&T at 107.

CONCLUSION

The Commission should clarify that cable modem service is a cable service or an information service, in order to create a stable regulatory climate in which the industry can move forward with its plans to deploy advanced services. The comments do not demonstrate any legal or policy basis for government-mandated access to the cable modem platform. The Commission also should reiterate its belief that its policy of vigilant restraint best ensures the competitive development of the nascent broadband industry. In light of the subscriber choice demonstrably emerging in the marketplace, there is no need for a rulemaking to ensure that multiple ISPs are available to cable subscribers.

Respectfully submitted,

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January 10, 2001

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, do hereby certify that I caused one copy of the foregoing Comment of NCTA to be served by hand to all parties listed below, on this 10th day of January, 2001.

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